Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Michael A. Lee,

Petitioner,

v.

Shenita Craighead and Sherell Craighead as Co-Trustees for the Heirs and Next-of-Kin of Charles Craighead, Deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a suspect intentionally seized by police challenge the Fourth Amendment reasonableness of the seizure based upon the risk posed to third parties?

2. When it was undisputedly improbable for a police officer, in hot pursuit of an armed felon, to confront the felon assaulting his next victim and find that the victim was holding the gun, and when no court had ruled on a similar case, did general principles of law "clearly establish" that it was unlawful to shoot the man with the gun?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceedings below were:

Petitioner Michael A. Lee is a City of St. Paul police officer who was a defendant/appellant in the Eighth Circuit. The City of St. Paul was also named as a defendant on both the federal and state law claims but the 42 U.S.C. § 1983 claim of municipal liability was dismissed. Therefore, the City of St. Paul is not a party to this action. Because petitioner is an individual, no disclosures are required by Supreme Court Rule 29.6.

Respondents Shenita Craighead and Sherell Craighead are co-trustees for the heirs and next-of-kin of Charles Craighead, deceased, and were plaintiffs/appellees below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005). Appendix to this petition ("App.") at A-1. The Order of the United States District Court for the District of Minnesota denying petitioners' motion for summary judgment is unpublished, No. Civ. 02-943 ADM/AJB, 2004 U.S. Dist. LEXIS 1034 (D. Minn. Jan. 27, 2004). App. A-13.

STATEMENT OF JURISDICTION

The opinion and judgment of the Eighth Circuit was entered on January 10, 2005. *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005). An order denying the petition for rehearing and petition for rehearing *en banc* was entered on February 18, 2005. *Craighead v. Lee*, No. Civ. 04-1377, 2005 U.S. App. LEXIS 2977 (8th Cir. Minn. Feb. 18, 2005). App. A-25. This petition for Writ of Certiorari has been filed within 90 days of that date. The Supreme Court has jurisdiction to review the decision of the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents initiated this action as a civil rights claim for damages under 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall be not violated."

STATEMENT OF THE CASE

On the morning of December 3, 2001, Carlos Scott went on a shooting spree armed with a .45 caliber handgun.

Scott shot his first victim in a drive-by shooting just after 9:00 a.m. Shortly after 10:00 a.m., he chased down his second victim on foot and shot him in the head. Scott fled the scene on foot and, within minutes, attempted to carjack decedent Charles Craighead. Craighead exited his vehicle and the two men began to fight. During the fight, Scott fired his gun again, but did not hit anyone. Witnesses feared Craighead would be shot. One witness reported to the 911 dispatcher, "A guy's pulling a gun, and there's going to be a shooting here," and moments later, "Hurry! Please, hurry!"

Petitioner, Officer Michael A. Lee, was the first police officer to catch up to Scott. Lee saw Scott and Craighead struggling and immediately exited his squad car to confront the situation. As expected, one man had a large caliber gun in his hand. The other man appeared to be fighting for his life. Lee trained his shotgun on the armed man, aimed at his upper body, center mass, and fired, killing the armed man and wounding the other man. Tragically and improbably, Craighead had wrestled the gun from Scott literally seconds before Lee arrived.

Respondents, Craighead's heirs, sued Lee and the City of Saint Paul under 42 U.S.C. § 1983 and state law, alleging that the shooting violated Craighead's right to be free from excessive force. Lee and the City moved for summary judgment. Respondents did not oppose the City's motion for summary judgment, but pressed their claims against Lee. Lee moved for summary judgment based upon qualified immunity. The District Court denied the motion and Lee appealed. The United States Court of Appeals for the Eighth Circuit affirmed the denial of summary judgment, and denied Lee's petition for rehearing en banc.

I. Incident giving rise to the case.

On December 3, 2001, Petitioner Lee, a 13-year veteran of the St. Paul Police Department, was working city-

wide traffic enforcement. He was wearing his standard police department blue uniform and was armed with a .40 caliber Glock pistol and Remington shotgun. Prior to December 3, 2001, Lee had never discharged a firearm in the line of duty.

That morning, Carlos Scott shot Arcell Magee in a drive-by shooting. Starting at 9:10:18 a.m., the dispatcher began broadcasting details of the Magee shooting,[1] informing all squads that the victim had driven his minivan to a fire station, and that the suspect was a black male driving a newer green SUV. Lee drove to the fire station, found the victim's minivan, and observed that the bullets had pierced the passenger door and impacted against the driver's door. Judging by the size and shape of the holes, Lee concluded they were caused by a large caliber gun, possibly a .45 caliber or .44 magnum. Lee photographed the minivan and returned to his squad. He heard another officer had stopped a car matching the description of the suspect vehicle. Lee assisted on that stop, spoke to the driver, and searched the car, but found nothing to connect it to the shooting.

Meanwhile, Scott parked the SUV and got an acquaintance to give him a ride to Shon Pierson's house on Iglehart. There, Scott confronted Pierson, chased him down, and shot him in the head. Scott then fled on foot. At 10:19 a.m., the dispatcher directed squads to 988 Iglehart on reports of shots fired. The dispatcher told the officers that a victim was behind 1001 Iglehart and a black male was running on Chatsworth towards Marshall. At 10:23 a.m., the dispatcher reminded all squads that this incident could be related to the earlier shooting. No further description of the suspect was available. Lee went to the scene where he saw other squads and an ambulance.

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[1] The Emergency Communication Center utilizes an operator and a dispatcher. The operator answers 911 calls and conveys the information to a dispatcher. The dispatcher communicates with police officers. Officers cannot hear conversations between 911 callers and operators.

A few blocks away, Scott confronted a man outside a house. Scott brandished his gun and asked the man for his car keys because he needed to get away. The man said, "No," and pleaded with Scott, "Don't do this to me." Scott asked if he could go into the house with him, but the man replied there were kids inside and again begged Scott not to involve him. The man feared for his life and the lives of anyone inside the house. Scott then saw Craighead by his car and approached him.

Craighead, accompanied by his fiancée, Joyce McDougle, the mother of Respondents Shenita and Sherrell Craighead, had driven to 217 North Oxford to discuss a house painting bid with Meredith Price. Price worked with Craighead on other jobs in the past. Craighead was in his car preparing the bid when Scott approached. Scott said to Craighead, "I need a ride." Craighead replied "I'm not taking you nowhere." Scott countered, "N-----, you're going to give me a mother f---ing ride." Craighead said "No, I ain't." Scott pulled up his shirt, showing the gun, and said, "Yes, you will." Craighead jumped out of his car saying, "You're going to pull a gun on me?"

Scott took the gun out and the two men began to wrestle for it. Price saw Scott approach Craighead's car, but thought nothing of it until Craighead said, "Don't pull that piece on me," and McDougle jumped out screaming, "Don't shoot my husband!" Using her cell phone, Price called 911. Price's call came in to the operator at 10:23:15. She told the operator, "I need a police at 217 Oxford. A guy's pulling a gun, there's going to be a shooting here." The operator took some additional information and forwarded it to the dispatcher. At 10:23:43 the dispatcher broadcast, "Squads, we got a black male with a gun at 217 North Oxford across from Central High School. We have somebody on the phone reporting this. Unknown if it's one or two parties with guns."

As the two men struggle by the car, Scott fired a shot. Price pleaded with the 911 operator, "Hurry! Please, hurry!"

Craighead somehow took the gun from Scott while they shuffled across the street locked in battle. The two men ended up fighting next to a dumpster in an alley across Oxford.

Officer Rob Stanway had responded to the shooting on Iglehart and was outside his squad in a nearby alley when he heard a gunshot. Stanway radioed in to the Emergency Communications Center to report the location of the gunshot. At 10:24:08, the dispatcher told all squads, "one shot fired."

Lee was on Iglehart at Oxford when he heard these radio reports. He drove north on Oxford, realized that the scene was south and made a U-turn. Lee believed that the gunman could be responsible for both shootings that morning. He also knew that the large caliber handgun had greater fire power than his service weapon, and exceeded the stopping power of his body armor. He removed the SPPD issued shotgun from its overhead rack, chambered one round, and placed it on his lap.

Driving south on Oxford, Lee saw McDougle running in his direction on the sidewalk to his left. He slowed and confirmed it was an unarmed woman. McDougle looked or pointed back and yelled, "He's got a gun." Lee drove to the dumpster just north of the alley where he saw two men grappling and pulling at each other. Lee assumed that the felon was the man with a gun and "stopped in front of the problem." That location provided the best vantage point. He got out of his squad armed with his shotgun. Lee saw the large caliber gun in Craighead's right hand. Lee advanced towards the two men. McDougle was screaming. McDougle testified the gun was pointed "like up."

Price told the operator, "The one that has the gun is not the guy, he's not the bad guy now. He's got it away from the bad guy." Officers cannot hear conversations between 911 callers and operators. The information was given to the dispatcher, who broadcast to the officers, starting at 10:24:18: "Received. One of the males took the gun away from another

male and we have it at 217 Oxford, across from Central." Lee and Stanway each testified that he never heard any portion of that dispatch.

Scott kept trying to get the gun away from Craighead. Lee feared for his life and the unarmed man's life. Lee was about 28 feet from Craighead. From that distance, the pellets from the shotgun cartridge would produce a spread of roughly ten inches in diameter. Lee aimed the shotgun at Craighead's upper body, center mass. Outside the squad about three seconds, Lee released the safety and fired one round at Craighead. Five pellets from the round struck the front of Craighead's upper torso and head, killing him. One pellet struck and seriously wounded Scott. At 10:29:28, the operator reported that Price said the police shot the wrong guy. The precise time that Lee shot Craighead has never been determined.

Petitioner retained three experts who provided the following uncontroverted, unrebutted opinions:

a. "The public is constantly given the message not to fight an armed man to defend their property, and such fights are extremely rare. Usually, a victim only fights an armed assailant when he has no choice, that is, when he is fighting for his life. No reasonable officer in Lee's position would guess that the victim had the gun."

b. It was objectively reasonable and tactically appropriate for Lee to arm himself with his SPPD-issued shotgun when he encountered Craighead and Scott.

c. "In all my experience in law enforcement, I have never had a situation, or known another officer to a have a situation, that when

responding to an aggravated assault with shots fired call and finding two people fighting, that the person that was now armed turn out to be the good guy who had just disarmed the bad guy."

d. An assailant holding a pistol above his head could shoot the perceived victim and/or Lee before Lee could react and shoot in self-defense. "At this point, tactically the man with the gun held the initiative. In other words, every second Lee took to learn more, without controlling the man with the gun, increased the risk that the victim and/or Lee would be shot."

The parties' respective experts did dispute whether an officer should have known he would be shooting both men. Petitioner's expert opined that, based on the training officers receive, a reasonable officer would believe that, at the distance separating Lee and Craighead, the pellets would be contained in a pattern that would limit the exposure to the unarmed man. Respondent's expert opined that an officer would have known he would hit both men.

II. Lower court rulings.

Neither court below performed a proper qualified immunity analysis. The district court found that this case arose "from a tragic and improbable sequence of events involving an innocent bystander's encounter with a dangerous fleeing felony suspect." *Craighead v. Lee*, No. Civ. 02-943 ADM/AJB, 2004 U.S. Dist. LEXIS 1034, at *1 (D. Minn. Jan. 27, 2004). Nevertheless, the district court denied petitioner's motion for summary judgment. In conflict with established law prohibiting section 1983 plaintiffs from asserting the rights of others, *e.g., Howerton v. Fletcher*, 213 F.3d 171, 173

(4th Cir. 2000); *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990); *TOPIC v. Circle Realty*, 532 F.2d 1273, 1275 (9th Cir. 1976); *McKelvie v. Cooper*, 190 F.3d 58, 64 (2nd Cir. 1999), the district court held the shooting of the armed man unreasonable specifically because of the risk to the unarmed man:

> Knowing that only one black male is suspected in the earlier crimes and that one of the two men before him most likely a victim, he gets out of his squad car and without any warning or command aims and fires his shotgun within a period of about three seconds. Given this set of facts, a scenario is presented in which Lee's decision to fire a shotgun at two persons cannot be said to be reasonable as a matter of law.

Craighead, 2004 U.S. Dist. LEXIS 1034, at *4. The district court then failed altogether to decide whether the particular right was clearly established. *Id.* at **4-6.

The Eighth Circuit affirmed the district court and adopted its reasoning. The Eighth Circuit had "no hesitancy" in ruling that Lee's use of force was objectively unreasonable, stating:

> Lee in a continuous sequence exited the squad car, aimed his shotgun *at the two men* wrestling, and fired without warning, within approximately three seconds, while Craighead was holding the gun overhead, pointed upward. *A trained shooter, such as Lee, would have known that under the circumstances the shot would hit both men, including the one man that Lee had to presume was a victim rather than a suspect.* Furthermore, the facts, taken in the light most favorable to

> Craighead's heirs and next of kin, show that Lee either was still in his car or had his pack set on when the dispatcher broadcast the news that the gun had changed hands. It would be objectively unreasonable for a police officer to fire *a shotgun* under such circumstances.

Craighead v. Lee, 399 F.3d 954, 961-962 (8th Cir. 2005) (emphasis added). That is the sum total of the court of appeals' analysis. The Eighth Circuit ignored the mandate, under *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), to judge reasonableness from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and to allow for the fact that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary." Instead, the court of appeals held the shooting was objectively unreasonable for precisely three reasons: (1) Lee would have known the shot would hit two men; (2) the gun was pointed in the air; and (3) a broadcast that the gun had changed hands, a broadcast which began seconds before the dispatcher began to relay a witness' report that Lee shot the wrong man.

Turning to what it recognized was the "more difficult" second *Saucier* question, the court of appeals held that the right was clearly established. *Craighead*, 399 F.3d at 962 (*citing Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The court conceded, "Neither party has cited a case with facts substantially similar to those we are required to assume on this appeal, nor have we found one." *Id.* Nevertheless, articulating the right at the grossest level of generality possible, the court of appeals held that it was clearly established that an officer may not use deadly force unless the suspect poses a significant threat of death or serious injury to the officer or others. *Id.* Then in an inexplicable departure from circuit precedent, and in conflict with other circuit

courts, the court of appeals held: "On the facts we are required to assume, Craighead did not pose a significant threat of death or serious physical injury to Lee at the time Lee fired the shotgun because the pistol was continuously over Craighead's head, pointed upward, as Craighead was keeping it from the smaller Scott." *Id.* By contrast, other courts have held an officer does not have to wait until he sees a gun pointed at someone to conclude the suspect poses an imminent threat. *See McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994) (shooting reasonable though officer never saw suspect holding a weapon); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (holding that, where suspect was shot and killed in his car after reaching below officer's line of sight, fact that suspect unarmed "irrelevant" where possibility existed gun could have been retrieved from under seat); *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997) ("Under [*Tennessee v. Garner*, 471 U.S. 1 (1985)], it is not necessary that the suspect be armed or threaten the officer with a weapon."); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) (suspect with sawed-off shotgun presented officer with "situation fraught with danger" though the weapon never actually pointed at anyone; reasonable to believe suspect might "wheel around" and fire). Absent from the opinion is any analysis of whether Lee was "reasonably mistaken" to believe that the armed man was the fleeing felon. *Craighead*, 399 F.3d at 961-963; *see Johnson v. Schneiderheinz*, 102 F.3d 340, 341 (8th Cir. 1996) ("[L]aw enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity.") (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); *McLenagan*, 27 F.3d at 1007-1008 ("We will not second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer and others.").

Next, rather than view the facts from the perspective of what an objectively reasonable officer could know, the court of appeals ruled the use of deadly force unjustified, errantly based, again, on the risk of harm to another. The court held:

> Even if Lee thought that Craighead posed a significant threat of death or serious physical injury to Scott, the facts we are required to assume show that Lee fired the shotgun in circumstances in which he knew or should have known that he would hit both Craighead and Scott, so he cannot have fired the shot to protect Scott.

Craighead, 399 F.3d at 962. Further, and without analysis, the court pronounced that a warning was feasible – *not* that it was *clearly established* that it was feasible – and concluded that the suspect "was not fleeing when Lee fired the shot." *Id.*

Had the violent felon still held the gun when Lee fired, no one could dispute that the felon posed an imminent threat, that the felon would have no viable excessive force claim, or that the felon could not defeat qualified immunity by pointing out that part of the shotgun blast also hit his assault victim. *See Milstead v. Kibler*, 243 F.3d 157, 163 (4th Cir. 2001) ("If we assume for the moment that this person had been Ramey, we believe that the use of deadly force in the circumstances would clearly have been justified."). The heart of the error below was the court's failure to start with the fact that Lee believed the armed man was Scott, and then perform the "reasonable mistake" analysis to determine the constitutionality of the shooting. *Craighead*, 399 F.3d 954. Instead, each of the courts below embarked on a course rife with constitutional error, casting vital principles of law into conflict and confusion, and defying this Court's repeated instructions to determine if the law was "clearly established" at an appropriate level of specificity.

REASONS FOR GRANTING THE WRIT

This case merits Supreme Court review because the Eighth Circuit decision creates a circuit split and establishes new, ill-conceived constitutional law – an armed assailant has the Fourth Amendment right not to be seized with lethal force if that force would pose a risk of harm to a third party. Thus, the decision denies officers responding to armed assaults the critical discretion to fire upon a suspect in immediate proximity to the victim, however dangerous, when the risk of not firing may be greater. Further, this case merits review because the courts of appeals continue to struggle in confusion as they apply this Court's directions for analyzing qualified immunity. It is difficult to understand the Eighth Circuit's unabashed reliance on *Garner's* generalized principles, in the context of the "tragic and improbable sequence of events" in this case, while conscious of this Court's recent correction of the Ninth Circuit in *Brosseau v. Haugen*, 125 S. Ct. 596 (2004). The court of appeals departed from its own precedent, opening a circuit split, by holding it clearly established that an armed suspect does *not* pose an imminent threat if his gun happens to be pointed in the air in the split second before the seizure. This Court should direct the lower courts not to rely on general principles when evaluating officer conduct in dangerous and exigent circumstances. Finally, the court of appeals has "clearly established" for future cases that a warning is feasible where the suspect's gun is not pointed at the assault victim or the officer at the moment of seizure.

I. The decision below creates a circuit split on constitutional issues of great importance.

The Eighth Circuit erred and opened a circuit split when it held the seizure objectively unreasonable because, in part, "[a] trained shooter, such as Lee, would have known that under the circumstances the shot would hit both men,

including the one man that Lee had to presume was a victim rather than a suspect," and a violation of clearly established law because "Lee fired the shotgun in circumstances in which he knew or should have known that he would hit both Craighead and Scott, so he cannot have fired the shot to protect Scott." *Craighead*, 399 F.3d at 962. What is striking about the lower court's risk-to-another factor is that it is wholly independent of the other reasons given; all that matters is that the two men were in close proximity to each other. The risk-to-another factor does not depend on who was holding the gun, or whether Lee might have heard a broadcast seconds before. Thus, the risk of harm to another was an essential element of the court's reasonableness analysis. Unrelated to the other factors considered, the risk-to-another factor alone must have sufficed – as it did in the district court – for the Eighth Circuit to hold the shooting unreasonable. This holding conflicts generally with every circuit that has considered the issue of third party rights in section 1983 actions, and conflicts squarely with recent decisions of the Fourth Circuit.

These courts have held that a party cannot base his or her section 1983 claim upon the rights of others. It is a "well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else." *Archuleta*, 897 F.2d at 497; *see, accord*, *TOPIC*, 532 F.2d at 1275 ("[L]itigants do not have standing to assert the rights of third parties who may have been injured by unlawful conduct."); *O'Malley v. Brierley*, 477 F.2d 785, 789 (3rd Cir. 1973) (applying the general rule that a litigant may assert only his own rights, and cannot sue for the deprivation of another's rights); *McKelvie*, 190 F.3d at 64 (holding bar-owner has no standing under section 1983 to assert violation of customers' Fourth Amendment rights); *Brown v. Bd. of Trustees of LaGrange Ind. School Dist.*, 187 F.2d 20, 25 (5th Cir. 1951) (stating "[I]t is elementary that [plaintiff] has no standing to sue for the deprivation of the

civil rights of others."). More precisely, this Court's Fourth Amendment seizure jurisprudence has always focused – to the exclusion of third parties – on the *suspect* and whether *the suspect's* actions pose a risk of harm to others. *Graham*, 490 U.S. at 396 ("[P]roper application of reasonableness test requires careful attention to . . . whether the suspect poses an immediate threat . . . and whether he is actively resisting arrest or attempting to evade arrest by flight."). Determining the reasonableness of a seizure requires balancing "the nature and quality of the intrusion on the *individual's* Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Garner*, 471 U.S. at 8 (internal quotes omitted; emphasis added).

In direct conflict with the instant case, the Fourth Circuit has held that the use of force inquiry is "not dependent at all on whether the officer did or did not subject third parties to risk." *Howerton*, 213 F.3d at 173. In *Howerton*, the district court instructed the jury not to consider the risk to bystanders when deciding if it was objectively reasonable to shoot an armed suspect as he accosted a woman. *Id.* at 172. Affirming, the Fourth Circuit recognized that the risk-to-another factor had no place in a Fourth Amendment analysis: "[T]he question is not whether the officer acted reasonably vis-a-vis the world at large. Rather, the question is whether the officer acted reasonably *as against the plaintiff*." *Id.* at 173 (emphasis in original). In accord with her sister circuits, the Fourth Circuit noted that section 1983 inures only to the benefit of the individual asserting the claim:

> [T]o recognize the risk posed to third parties by the official use of force as a component of the excessive force inquiry would be, in effect (though admittedly not in fact) to afford the section 1983 plaintiff standing to seek and

> obtain relief for the unreasonable use of force against third parties.

Howerton, 213 F.3d at 174 (citing *Archuleta*, 897 F.2d at 497). The Fourth Circuit reasoned that *Garner's* test for the lawful use of deadly force "certainly does not take account of the risk that official action poses to third parties, and in fact leaves little or no room for the consideration of such[.]" *Id.* The Fourth Circuit recently reaffirmed this principle: "When we speak of Fourth Amendment reasonableness, we are taking many factors into consideration, but not all. We are not, for example, considering potential harm to third persons[.]" *Altman v. City of High Point*, 330 F.3d 194, 212 (4th Cir. 2003).

By departing from this "well-settled principle," the decision below not only opens a circuit split, but sets dangerous and difficult precedent. Officers nationwide respond to armed assaults on a daily basis. According to a 2003 Justice Department report, between 1993 and 2001 there was an annual average of 2.3 million violent crimes involving a weapon, including 846,950 where the weapon was a firearm. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 194820, National Crime Victimization Survey, 1993-2001 (2003). With a daily average of roughly 2,320 violent gun crimes, courts must give officers clear and consistent rules for the use of lethal force. Those rules must not automatically prohibit officers from using lethal force where such force poses a risk to the victim. Officers must have some discretion to decide if the risk posed by all other options is greater. Officers responding to armed assaults in progress do not have the luxury of making a good choice or a bad one; *every* choice poses grave risk and there is no time to deliberate.

Moreover, the Eighth Circuit's risk-to-another factor is not dependent on the use of a shotgun – though, indeed, officers often must use shotguns. Anytime an officer fires a

weapon when two people are struggling, the discharge poses a real risk to the victim; and when officers respond to an armed assault, the victim is commonly in immediate proximity to the suspect. Where the circumstances require immediate action, it is unreasonable to require officers on scene to stand by while the victim fights for his or her life. *Cf. McLenagan*, 27 F.3d at 1007 ("The hesitation involved in giving a warning could readily cause such a warning to be his last."). Is deadly force no longer an option in hostage situations? Does the Constitution prescribe some minimum zone of safety for victims before officers may fire on the suspect? By its holding, the Eighth Circuit has robbed officers of the discretion to determine whether the risk of not shooting is greater than the risk posed by shooting.

Now, in the Eighth Circuit an armed assailant has the Fourth Amendment right not to be seized with lethal force if that force would pose a risk of harm to a third party. The risk-to-another factor does not distinguish between felon and victim. It is undisputed that in virtually all cases the felon, not the victim, will have the weapon and therefore be the object of the seizure. The uncontroverted expert testimony is that in real life the victim rarely has the weapon. That is what makes the facts of this case so tragically improbable. Thus, the ruling below inures to the benefit of violent felons and ties the hands of those fighting to serve and protect. A felon who has committed an armed assault could now sue for excessive force arguing that the use of force posed a risk of harm to his victim.

This absurd result is unnecessary to vindicate the interests of third parties, whose rights are protected by the Fourteenth Amendment. In fact, the holding below gives felons greater rights than the third parties themselves enjoy. When an injured third party brings a section 1983 action, the trial court must apply this Court's Fourteenth Amendment substantive due process jurisprudence. *Evans v. Avery*, 100 F.3d 1033, 1036 (1st Cir. 1992) (noting that "outside the

context of a seizure. . . a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983."). Unlike the suspect's Fourth Amendment claim, the third party's claim is analyzed under a subjective standard. *Id.* That subjective standard, which proscribes conduct that is conscious-shocking, reckless, or deliberately indifferent, is much higher than the Fourth Amendment's objective standard, which proscribes conduct that is merely unreasonable. *Graham*, 490 U.S. at 399 ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry."). Therefore, under the holding below, a felon now has the legal precedent to support a claim that his Fourth Amendment rights were violated – because the officer used force that was unreasonable *vis-a-vis* a third party – in situations where the third party could make no viable claim that the officer violated her Fourteenth Amendment rights.

Trial courts must be instructed *not* to consider what happened to third parties, as the Fourth Circuit has instructed its trial courts. This Court should grant the writ to reverse the Eighth Circuit's contrary ruling.

II. This court should grant review to direct lower courts not to rely on general principles where officers must act under exigent circumstances, and to settle important law now cast into conflict and doubt.

This case demonstrates that the bench, deliberative by nature, naturally resists *Saucier's* instruction to recognize that officers usually have no opportunity to deliberate. This Court should grant review to address the blind eye the Eighth Circuit has turned to this Court's "clearly established" jurisprudence, and to caution the lower courts not to rely on general principles in unique and exigent circumstances. Simultaneously citing and ignoring this Court's most recent

qualified immunity decision, the court below demonstrates that the work of instilling this critical doctrine in the judicial mind set is not yet finished. Further, this Court should grant review to resolve an important circuit split regarding the use of lethal force when confronting a suspect brandishing a gun, and to prevent the holding below from forcing officers to hesitate in circumstances that present the highest risk to officers and the public: apprehending fleeing, armed, violent felons willing to do anything to escape apprehension.

In *Hope v. Pelzer,* this Court noted that, in an obvious case, general principles might give officers fair warning that their conduct is illegal. 536 U.S. 730, 741 (2002). *Hope* itself did not, however, turn on general principles. The case involved the deliberate acts of prison guards who faced no exigency, fear, or volatility. *Id.* Nevertheless, this Court in *Hope* reviewed precedent to determine that the guards had fair warning that their conduct was illegal. *Id.* at 742. In fact, the available precedent was so directly on point that the guards were left to attempt to distinguish handcuffing to a hitching post from handcuffing to fences or the bars of jail cells. *Id.*

Just last year, this Court remonstrated the Ninth Circuit for applying general principles to find the law clearly established in an excessive force case. *See Brosseau*, 125 S. Ct. at 599. Applying general principles, the Ninth Circuit denied qualified immunity to an officer who shot a fleeing felon because she feared his reckless driving placed people in the immediate area at risk. *See Id.* at 600. Summarily reversing the Ninth Circuit, this Court rebuffed the use of general principles to find the law clearly established:

> *It is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.* As we previously said in this very context:

> There is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. . . . [T]he right must have been "clearly established" in a more particularized, and hence more relevant sense[.] . . .
>
> The Court of Appeals acknowledged this statement of law, but then proceeded to find fair warning in the general tests set out in *Graham* and *Garner*. *In so doing it was mistaken*. . . . Of course, in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law. . . . *The present case is far from the obvious one* where *Graham* and *Garner* alone offer a basis for decision.

Id. at 599 (internal citation omitted; emphasis added). This Court further noted the obvious – that cases post-dating the incident could not provide fair warning to an officer. *Id.* at 600 n.4.

If *Brosseau* was not the obvious case, neither is the instant case. Here, the Eighth Circuit cited *Brosseau*, attempted to distinguish it on its facts, and plainly ignored its message. *Craighead*, 399 F.3d at 962 (citing *Brosseau* for the proposition that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine whether it was clearly established"); *Id.* at 962 n.4 (distinguishing *Brosseau*). While the Ninth Circuit at least debated the import of a few similar cases, *Brosseau v. Haugen*, 339 F.3d 857, 871-872 (9th Cir. 2003), the Eighth Circuit below acknowledged that there were no cases with

similar facts to this one. *Craighead*, 399 F.3d at 962. Instead, it relied on cases decided both before and *after* the incident for the general principle that lethal force is not authorized if the suspect does not pose an imminent threat to the life or safety of the officer or others. *Id.* at 962-963. Rejecting this Court's timely rebuff, the Eighth Circuit found that these general principles gave Lee fair warning that he could not shoot the armed man struggling with another. *Id.* at 963. This Court should grant review to insist that the courts of appeals adhere to its precedents.

Furthermore, in the context of dangerous and exigent circumstances, this Court should direct the bench to resist the natural temptation to rely on general principles of law. Given the human tragedy often associated with such events, and hindsight not easily resisted by the most disciplined minds, these cases present courts with great temptation to cling to general principles. Mindful of *Hope's* fair warning standard, however, the Eleventh Circuit presciently held: "Officers facing split-second decisions in dangerous or life-threatening situations are seldom provided with fair warning, notice or guidance by a general requirement of reasonableness." *Willingham v. Loughnan,* 321 F.3d 1299, 1303 (11th Cir. 2003). Additionally, this reliance on general principles thwarts *Saucier's* plan to incrementally develop the body of established law with each new case. *Saucier*, 533 U.S. at 201 (setting forth principles upon which a right is clearly established is "the process for the law's elaboration from case to case, and . . . one reason for our insisting upon . . . the first inquiry."). Therefore, this Court should grant review to emphasize that general principles rarely provide fair warning in dangerous and exigent circumstances.

Moreover, the Eighth Circuit's errant analysis casts important law into conflict and doubt. The court reasoned it was clearly established Lee could not shoot because: (1) the gun pointed up in the air posed no imminent threat to the officer; (2) a warning was feasible; and, (3) Lee could not

have fired to protect the other man since he shot both men. Yet, a cursory review of the applicable law demonstrates just the opposite.

First, it is clearly established that officers need not wait until they see the gun aimed at someone, and the Eighth Circuit departed from its own precedent and opened a circuit split by ruling otherwise. *See Parks v. Pomroy,* 387 F.3d 949, 957 (8th Cir. 2004) (holding suspect posed imminent threat where gun was inches from the suspect's hand); *Slattery v. Rizzo*, 939 F.2d 213, 215-17 (4th Cir. 1991) (deadly force was justified where suspect in vehicle repeatedly refused orders to raise his hands and the officer perceived that he was holding something); *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) (holding it "irrelevant" that the suspect was actually unarmed - "had [he] in fact retrieved a gun from his seat, he could have caused injury or death[.]"); *McLenagan*, 27 F.3d at 1007 (4th Cir. 1994) (split-second decision to shoot reasonable despite fact officer never saw handcuffed suspect holding a weapon); *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001) (shooting unarmed suspect facing away from the officer reasonable where the suspect was reaching for what the officer thought might be a weapon); *Milstead*, 243 F.3d at 165 (shooting of unarmed suspect reasonable despite mistaken belief he was armed). The holding below is all the more chilling to law enforcement because Lee was in hot pursuit of an armed felon who just shot two people.

Second, in *Garner*, the Supreme Court held that an officer should deliver a warning "where feasible" before using deadly force. 471 U.S. at 11-12. *Garner* refused to inflexibly require a warning in every circumstance, plainly recognizing that a warning was not always feasible. So too have other courts. *See Carr v. Tatangelo*, 338 F.3d 1259, 1269, n.19 (11th Cir. 2003) (*quoting McLenagan*, 27 F.3d at 1007) ("We decline, therefore, to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing--particularly where, as here,

such a warning might easily have cost the officer his life."). In this case, and in the absence of factually similar cases, the Eighth Circuit concluded "the facts we are required to assume show that a warning was feasible but not given." *Craighead*, 399 F.3d at 962. Lee arrived moments after the suspect had fired his weapon for the third time that morning, to find the perceived suspect committing another armed assault. The court of appeals had before it uncontroverted expert testimony that the gunman held the initiative and could shoot the victim and/or Lee before the Lee would have time to react. At that time, it was not clearly established that a warning was feasible. Indeed, to this date, the few courts to have considered the feasibility of a warning in circumstances similar to those presented in this case have concluded that it was not feasible. *See e.g., Ridgeway v. City of Woolwich Twp. Police Dep't*, 924 F. Supp. 653 (D. N.J. 1996) (stating that warning not feasible where "officer reasonably believes, based on the suspect's prior conduct, that such a warning would not cause the suspect to surrender, but rather would provoke the suspect to engage in violent and life-threatening behavior, or to increase his or her efforts to flee."). *See also Estate of Martinez v. City of Federal Way*, 105 Fed. Appx. 897, 899, 2004 U.S. App. LEXIS 13850, *5 (9th Cir. 2004) ("verbal warnings are not feasible when lives are in immediate danger and every second matters."); *Turpin v. Mueller*, 37 Fed. Appx. 151, 154, 2002 U.S. App. LEXIS 9766, *8 (6th Cir. 2002) ("[B]ecause [the officer] reasonably believed that he was in imminent danger, giving a warning would not have been feasible."); *Powell v. Mayhew*, 1998 U.S. App. LEXIS 30785, *8 (7th Cir. 1998) ("[The officer] had only seconds to react. Had he not shot at [the suspect], he would have put his own life at risk. [U]nder the circumstances, a warning was not feasible[.]").

Third, as discussed above, no court has ever held that a person has the right not to be seized if the force used poses a risk to another, and again, the court of appeals opened a

circuit split by ruling otherwise. If that ruling now stands as law, it was not clearly established at the time of the incident. *See Brosseau*, 125 S. Ct. at 600 n.4. It is important to note what the court of appeals did not say. It did *not* reason that it was clearly unlawful to shoot because it had to assume Lee heard the broadcast that the gun had changed hands. Such a holding would be wrong for a number of reasons.[2] Whatever was in the mind of the court below, what matters is the precedent it penned: a gun pointed up is not an imminent threat; it is feasible to warn a violent fleeing felon in the act of committing another armed assault; and, an officer may not seize a suspect if doing so risks harm to another.

Now officers must question whether they can use lethal force if the suspect's gun is not trained on them. Now officers in hot pursuit of a violent fleeing felon, must give a warning before shooting a violent felon in the act of committing armed assault. Now officers must hesitate to shoot, no matter how grave the risk of hesitating, if there is a risk they might hurt another person. Officers looking to this opinion for guidance on the use of deadly force will instead

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[2] Some of those reasons include: the scant *seconds* within which the officer must act; the improbability of finding a victim with a gun; the absence of any experience regarding what behavior to expect when a gun changes hands; the fact that eyewitness accounts of violent crimes can be unreliable; the age of the information broadcast (*i.e.*, the gun could have changed hands again); the counterintuitive nature of the information broadcast; and, the ambiguity of the victim's intentions once he gains the upper hand. Barring hindsight, officers cannot know if they are witnessing a carjacking, a turf war, a drug feud, or any number of other scenarios officers encounter every day. The broadcast stated that "one of the males took the gun away from another male." Hindsight establishes that Craighead was an innocent victim, and his death is a tragedy. In police experience, however, the difficult fact remains that not all "other males" are innocent or hold benign intentions. Given all the uncertainty surrounding the extreme situation, the absence of any similar cases for guidance, and the split seconds Lee had to act, it was not clearly established that Craighead did not pose an imminent threat.

be confused, chilled, and, ultimately, less willing to engage in the kind of vigorous law enforcement this Court has taken pains to encourage.

CONCLUSION

Petitioner Michael A. Lee respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1377

Shenita Craighead and Sherell Craighead,
as Co-Trustees for the Heirs and Next-of-Kin
of Charles Craighead, Deceased,
Appellees,

*
*
*Appeal from the United States
v. *District Court for the District
*of Minnesota
*
*
Michael A. Lee and *
the City of St. Paul, *
Appellants.

Submitted: November 19,2004
Filed: January 10, 2005 **(Corrected 3/1/05)**

Before WOLLMAN and HEANEY, Circuit Judges, and HOLMES,[1] District Judge.

HOLMES, District Judge.

Carlos Scott shot two men in less than two hours on the morning of December 3, 2001. After doing so, he pulled his gun on Charles Craighead, but Craighead wrestled the gun away from him. Craighead and Scott were still wrestling when Officer Michael Lee arrived shortly after Craighead had taken the gun from Scott. Lee's shotgun blast killed Craighead and wounded Scott.

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[1] The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas, sitting by designation.

Craighead's heirs and next of kin brought this action against Lee individually and against the City of St. Paul, asserting claims under 42 U.S.C. § 1983, the Minnesota Wrongful Death Act (Minn. Stat. 573.02), and the common law of Minnesota. Lee and the City of St. Paul moved for summary judgment based on qualified immunity as to the Section 1983 claims and based on official immunity as to the state-law claims. Craighead's heirs and next of kin conceded their Section 1983 claims against the City of St. Paul, which left the claim against Lee individually as the only count premised on federal law. The district court[2] denied the motion for summary judgment. Lee and the City of St. Paul appeal that ruling. We affirm.

I.

The facts, are undisputed as to the events that preceded Lee's arrival on the scene where Craighead and Scott were wrestling over the gun.

On the morning of December 3, 2001, while driving a borrowed vehicle, Scott shot Arcell Magee in a drive-by shooting. The St. Paul police dispatcher alerted the patrolmen on duty through the St. Paul police communications system at 09:10:18. The only description of the gunman was that he was a black male. Scott abandoned the borrowed vehicle, obtained a ride to the house of Shon Pierson, met Pierson on the sidewalk, chased him down, and shot him in the head. That shooting was reported by the dispatcher in three different announcements between 10:18:55 and 10:19:50.

Scott fled on foot. Over the next four minutes, the dispatcher reported sightings of a black male running in the area. Scott went to the vicinity of Marshall and Oxford, where

[2] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

he twice attempted to hijack a car. The first man begged, "Don't do this to me," and Scott left him. Scott then saw Charles Craighead next to a car and approached him. Craighead had just left the house of Meredith Price after negotiating a contract to paint her house. He was accompanied by Joyce McDougle. Scott attempted to force Craighead to give him a ride. Craighead grabbed Scott, and the two men started wrestling. Craighead, like Scott, was a black male.

Price called 911 at 10:23:15 and said, "I need police at 217 Oxford. A guy's pulling a gun, there's going to be a shooting here." Price continued to talk to the 911 operator as events transpired. At 10:23:43, the dispatcher broadcast, "Squads, we got a black male with a gun at 217 North Oxford across from Central High School. We have somebody on the phone reporting this. Unknown if it's one or two parties with guns." As the two men struggled, a shot was fired. At 10:24:08, the dispatcher told all squads, "one shot fired," and she followed up at 10:24:18 with the location: "Oxford and Marshall."

The wrestling took the two men across the street toward a dumpster. As they were wrestling, Craighead took the gun away from Scott.

Lee was in the vicinity, and he started driving toward North Oxford across from Central High School. Lee thought that the gunman could be the one who was responsible for the two shootings earlier that morning. He removed the shotgun issued by the St. Paul Police Department from its overhead rack and chambered one round. Driving south on Oxford, Lee crossed Marshall where he saw McDougle. He then drove further until he came to the dumpster where the two men were wrestling. Lee exited his squad car with his shotgun in hand.

From the time that Lee exited the squad car with his

shotgun in hand, the testimony diverges. At 10:24:18, the dispatcher broadcast a report: "Received. One of the men, the males, took a gun away from another male and we have it at two nine seventeen North Oxford, across from Central." Lee testified that he had already exited the squad car when that report was broadcast. Craighead's heirs argue that the timing of the events makes it likely that Lee was still in the squad car when the dispatcher broadcast the news that the gun had changed hands. Lee also testified that when he exited the car he did not turn on his portable communications unit known as a "pack set," so he did not hear the news that the gun had changed hands. Craighead's heirs note that Lee testified that he customarily maintained radio contact when not in his car through his "pack set" and that he would turn his pack set on by reflex when he exited the car. Another officer testified that Lee's habit is common practice among St. Paul police officers.

When Lee exited the squad car, his focus was on the man with the gun – Craighead. Lee testified that he yelled at the top of his voice several times, drop the gun, drop the gun, drop the gun. Lee says that Craighead responded, looked at him, and placed the gun on the top of an object in the dumpster. Because the gun was still in reach, Lee continued to yell at Craighead to drop the gun, drop the gun. A moment later, according to Lee, Craighead reached back in the dumpster and grabbed the gun, pointed the gun toward Scott, and then pointed it back toward Lee. Lee says that, when Craighead pointed the gun back toward him, he hit the safety on his shotgun, aimed at Craighead, and fired. Craighead and Scott were still wrestling when Lee fired. Lee was approximately 30 feet from them. The shot hit both men. Scott fell immediately, but Craighead did not, which made Lee think he had missed Craighead. He yelled at Craighead, get down, get down, and then Craighead went down. The 911 operator reported at 10:24:28, "Says the police shot the wrong guy." Lee reported at 10:24:29, "Shots fired! One down!"

Lee estimated that ten seconds passed between his exiting the squad car and firing the shotgun. Assuming that he fired before 10:24:28 -when the dispatcher reported, "Says the police shot the wrong guy" – on Lee's account he would have been outside his car when the dispatcher broadcast the report at 10:24:18 that the gun had changed hands.

The testimony of Price and McDougle conflicts with Lee's. Price and McDougle testified that Craighead held the gun over his head pointed upward throughout his struggle with Scott. Craighead was substantially taller than Scott and was holding the gun out of Scott's reach as an older child would hold an object out of the reach of a younger child who was trying to take it from him. Price and McDougle testified that Craighead never pointed the gun toward Lee. They testified that Lee did not tell Craighead to put the gun down. They testified that Lee gave no warnings and no commands. They testified that Craighead never put the gun on an object in the dumpster. McDougle estimated that seven or eight seconds passed between the time Lee exited his car and the time he fired his shotgun. Price testified, "[Lee] arrived, got out of the car, and shot him. It was pretty much that quick." She estimated that three seconds passed between the time Lee exited the squad car and fired his shotgun. "It all happened very, very quickly."

If Lee fired the shot six seconds or less before 10:24:28 when the 911 operator reported, "Says the police shot the wrong guy," and if Lee took only three seconds from exiting the car until firing the shot, he would have been in his car when the dispatcher reported that the gun had changed hands.

Another officer, Rob Stanway, followed Lee to the scene at a distance of three or four car lengths. Stanway saw the men wrestling, saw the gun, and started to open his door

and take cover behind it so that he would not be exposed to pistol fire, but he heard the blast of Lee's shotgun before he could get out. He did not see Lee fire.

Both sides submitted expert witness reports. Defendants' experts say that Lee's actions were objectively reasonable. Plaintiffs' experts say that they were not. Plaintiffs' experts say that, at the distance of some 30 feet, under the circumstances with the two men grappling, a trained shooter would have known that the shot would probably hit both men. One of plaintiffs' experts opined, "The shooter elected to shoot both the suspect and his victim, whomever either might be, without any discrimination whatsoever for who was going to be seriously injured and/or killed[.]" Another of plaintiffs' experts opined, "Officer Lee consciously chose to discharge his firearm at both men, reasonably knowing that one of them was not the suspect and was not involved in any criminal activity."

II.

In deciding a motion for summary judgment, a district court must view the facts and inferences in the light most favorable to the party opposing summary judgment. *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 841 (8th Cir. 2001). The district court did so here. Thus, the district court accepted plaintiffs' version of the facts according to which Craighead held the gun over his head, pointed upward, throughout his struggle with Scott; Lee knew that only one black male was suspected in the earlier crimes; Lee knew that one of the two men before him was most likely a victim; and Lee exited his squad car and fired his shotgun within three seconds, without issuing any warnings or commands, under circumstances in which a trained shooter would have known that the shot would hit both men.

Because this is an interlocutory appeal from the denial

of qualified immunity, our review is limited to the legal question of whether Lee and the City of St. Paul are entitled to immunity. We have jurisdiction to review whether an official is entitled to immunity to the extent the question turns on an issue of law, but we may not review a district court's conclusion that the pretrial record presents a sufficient factual dispute requiring a trial. *Hawkins v. Holloway*, 316 F.3d 777, 781 (8th Cir. 2003). Thus, we must accept the summary judgment facts as described by the district court because evidentiary determinations are not presently appealable. *Moran v. Clarke*, 359 F.3d 1058, 1060 (8th Cir. 2004). We will affirm the denial of summary judgment on the issue of qualified immunity if a genuine issue of material fact exists as to whether a reasonable officer could have believed his actions to be lawful. *Wilson v. City of Des Moines*, 293 F.3d 447, 449 (8th Cir. 2002).

III.

In a suit against an officer for an alleged violation of a constitutional right, the elements of qualified immunity must be considered in proper sequence. The first question is, taken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). If the facts, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, the second question is whether the right was clearly established. *Id.* at 202, 121 S. Ct. at 2156.

Since this case presents an issue of whether an officer used excessive force, the case must be analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Conner*, 490 U.S. 386, 388, 109 S. Ct. 1865, 1867-68, 104 L. Ed. 2d 443 (1989). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts

and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397, 109 S. Ct. at 1872. Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699, 85 L. Ed. 2d 1 (1985). Notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. *Id.* at 9, 105 S. Ct. at 1700. "The intrusiveness of a seizure by means of deadly force is unmatched." *Id.* Hence, "[wlhere the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* at 11, 105 S. Ct. at 1701. "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11- 12, 105 S. Ct. at 1701.

As to the first question that Saucier requires us to address, we have no hesitancy in saying that the facts alleged, taken in the light most favorable to Craighead's heirs and next of kin, show that Lee's use of deadly force was objectively unreasonable.[3] The evidence most favorable to Craighead's heirs and next of kin shows that Lee in a continuous sequence exited the squad car, aimed his shotgun at the two men wrestling, and fired without warning, within approximately three seconds, while Craighead was holding the gun overhead, pointed upward. A trained shooter, such as Lee, would have known that under the circumstances the shot would hit both

[3] We emphasize that we are bound in this interlocutory appeal to accept the facts found by the district judge, who in turn was required to view the facts in the light most favorable to the party opposing summary judgment. At trial, the finder of fact may disbelieve any or all of the facts assumed in this opinion and may credit Lee's testimony and that of his experts against the evidence offered by plaintiffs.

men, including the one man that Lee had to presume was a victim rather than a suspect. Furthermore, the facts, taken in the light most favorable to Craighead's heirs and next of kin, show that Lee either was still in his car or had his pack set on when the dispatcher broadcast the news that the gun had changed hands. It would be objectively unreasonable for a police officer to fire a shotgun under such circumstances.

The more difficult question is the second one that *Saucier* commands us to address, *i.e.*, whether the right was clearly established. A right is clearly established when that right is so clear that a reasonable official would understand that what he is doing violates that right. *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2156. Although the first question is one of objective reasonableness and the second question is also one of reasonableness, the Supreme Court emphasized in Saucier that the two questions are not duplicative and must be addressed separately. The key distinction between the two questions is that the right allegedly violated must be defined at the appropriate level of specificity before a court can determine whether it was clearly established. *Id.* See also *Brosseau v. Haugen*, 543 U.S. ___, 125 S. Ct. 596, 599-600, 160 L. Ed. 2d _____ (2004); *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 1700, 143 L. Ed. 2d 818 (1999).

Neither party has cited a case with facts substantially similar to those we are required to assume on this appeal, nor have we found one. Nonetheless, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.* Hence, the issue is not whether prior cases present facts substantially similar to the present case but whether prior cases

would have put a reasonable officer on notice that the use of deadly force in these circumstances would violate Craighead's right not to be seized by the use of excessive force. At least since Garner was decided nearly 20 years ago, officers have been on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others. On the facts we are required to assume, Craighead did not pose a significant threat of death or serious physical injury to Lee at the time Lee fired the shotgun because the pistol was continuously over Craighead's head, pointed upward, as Craighead was keeping it from the smaller Scott. Even if Lee thought that Craighead posed a significant threat of death or serious physical injury to Scott, the facts we are required to assume show that Lee fired the shotgun in circumstances in which he knew or should have known that he would hit both Craighead and Scott, so he cannot have fired the shot to protect Scott. Nor does Lee claim that he fired to protect Scott. The facts we are required to assume show that a warning was feasible but not given. Moreover, Craighead was grappling with Scott; he was not fleeing when Lee fired the shot.[4]

Before December 3, 2001, this Court had denied qualified immunity in at least four cases in which the plaintiff presented evidence to show that the officer used deadly force under circumstances in which the officer should have known that the person did not present an immediate threat of serious physical injury or death. *Ribbey v. Cox*, 222 F.3d 1040 (8th Cir. 2000); *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999); *Woolfolk v. Smith*, 81 F.3d 741 (8th Cir. 1996); *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995). In addition, in *Gardner*

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[4] Unlike *Brosseau*, which the Supreme Court decided on December 13, 2004, the facts we must assume show that Lee gave no commands and made no attempt to use less-than-deadly force; nor, as mentioned, was Craighead fleeing when Lee fired.

v. Buerger, 82 F.3d 248 (8th Cir. 1996), this Court reversed a judgment as a matter of law in favor of an officer because a jury could reasonably have believed that the officer used deadly force against a person who did not pose an immediate threat of serious physical injury or death to him. Those cases, along with *Garner*, put officers on notice before December 3, 2001, that they may not use deadly force under circumstances in which they should know that the suspect does not present an immediate threat of serious physical injury or harm. Craighead's right not to be seized by deadly force was clearly established with sufficient specificity to meet the second prong of *Saucier*.

In *Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2002), which was decided seven months after December 3, 2001, this Court affirmed denial of summary judgment on qualified immunity where the plaintiff presented evidence to show that deadly force was used in 1999 against a person who did not pose an immediate threat of serious physical injury or death to the officer. In each of these six cases -*Ribbey*, *McCaslin*, *Gardner*, *Woolfolk*, *Ludwig*, and *Wilson* -the officer presented evidence to show that the person against whom deadly force was used had posed a significant threat of death or serious physical harm. Nevertheless, in each case, this Court held that a genuine issue of material fact precluded entry of summary judgment as a matter of law in favor of the officer. *See also Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2nd Cir. 2003); *Carr v. Castle*, 337 F.3d 1221 (10th Cir. 2003); *Curley v. Klem*, 298 F.3d 271 (3rd Cir. 2002); *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002). Wilson held that summary judgment on qualified immunity was inappropriate because "[t]he current record does not conclusively establish the reasonableness of the officers' actions or beliefs." *Wilson*, 293 F.3d at 454. Likewise, the record here does not conclusively establish the reasonableness of the officer's actions. Therefore, the district court correctly held that

summary judgment on the basis of qualified immunity is inappropriate.

IV.

The district court also denied Lee and the City of St. Paul's motion for summary judgment based on official immunity as to the state-law claims. Under Minnesota law, the decision to use deadly force is a discretionary decision entitling a police officer to official immunity absent a willful or malicious wrong. *Maras v. City of Brainerd*, 502 N.W.2d 69, 77 (Minn. 1993). Official immunity also protects government entities from vicarious liability for actions that are entitled to immunity. *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 316 (Minn. 1998). In determining whether an official committed a willful or malicious wrong, the court considers whether the official has intentionally committed an act that he had reason to believe is prohibited. *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571-72 (Minn. 1994). Whether or not an officer acted willfully or maliciously is usually a question of fact to be resolved by the jury. *Maras*, 502 N.W.2d at 77. The reasoning that led us to affirm the denial of qualified immunity as to plaintiffs' Section 1983 claims leads us to affirm the denial of official immunity as to the state-law claims.

V.

The ultimate outcome of this case may well depend on whose testimony the finder of fact believes. This is a classic example of a case that should be decided by trial rather than by summary judgment. Therefore, we affirm.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Shenita Craighead and Sherell Craighead,
as co-trustees for their heirs and next of kin
of Charles Craighead, deceased,

Plaintiffs,

v.

Michael A. Lee and
the City of St. Paul,

Defendants.

MEMORANDUM OPINION AND ORDER
Civil No. 02-943 ADM/AJB

Frederick J. Goetz, Esq., Goetz & Eckland P.A., Minneapolis, MN, and John C. Goetz, Esq, Schwebel, Goetz & Sieben, P.A., Minneapolis, MN, appeared for and on behalf of Plaintiffs.

Peter G. Mikhail, Esq., and Frank E. Villaume III, Esq., Assistant Saint Paul City Attorneys, appeared for and on behalf of Defendants.

I. INTRODUCTION

On December 4, 2003, the parties presented oral arguments on the Motion for Summary Judgment [Docket No. 371 of Defendants Michael A. Lee ("Lee" or "Officer Lee") and the City of St. Paul ("the City") before the undersigned United States District Judge. Defendants assert immunity protects them from the violation of civil rights allegations brought by Plaintiffs Shenita Craighead and Sherell Craighead. as co-trustees for their heirs and next of kin of Charles Craighead, deceased, ("Plaintiffs"). For the reasons set forth below, Defendants' Motion is denied in part and granted in part.

II. BACKGROUND[1]

This case arises from a tragic and improbable sequence of events involving an innocent bystander's encounter with a dangerous fleeing felony suspect. At approximately 9:10 on the morning of December 3, 2001, a 911 operator transmitted a report of a drive-by shooting in the area of Van Buren, Minnehaha and Victoria streets in St. Paul, Minnesota. Jeffery Aff. ¶ 11. Officer Michael Lee, a 13-year veteran of the St. Paul Police Department, was working traffic patrol and received the dispatch broadcast to all squad cars stating the shooting suspect was a black male driving a green Ford Explorer. Lee proceeded to the reported location of the shooting and observed the victim's car door with bullet holes made by a large caliber gun. At around 10:20 a.m., another "shots fired" dispatch was relayed. Officers were told of a victim near the intersection of Chatsworth and Iglehart in St. Paul, and that a black male was running on Chatsworth toward Marshall Avenue, who the dispatcher stated could be the victim or the shooter. Id. Officer Lee drove to this second crime scene where he observed other police cars and an ambulance. A few minutes later, the dispatcher broadcast a report of a man with a gun at 217 North Oxford, the residence of Meredith Price ("Price"), a woman Charles Craighead ("Craighead"), the decedent, had visited that morning. Information was dispatched that someone was on the phone reporting a black male had a gun at this location, and that it was "[u]nknown if it's one or two parties with guns." Id.

Prior to this third reported incident, Carlos Scott ("Scott") had shot the victim of the drive-by attack at Minnehaha and Victoria with a .45 caliber pistol and fled in a green sport utility vehicle. Nelson Aff. ¶¶ 6-9. Scott then drove to a home on Iglehart Avenue and shot a second victim in the head, fleeing on foot in the direction of Marshall

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[1] Defendants have accepted Plaintiffs' version of the facts, as must the Court, for purposes of this summary judgment analysis.

Avenue. Id. ¶¶ 8, 9. At the time of these shootings, Craighead was speaking with Price regarding a bid for a painting project. At one point, he returned to his car, parked on Oxford Street, to prepare a proposa Price Dep. at 33-34. At about this time, Scott was near the intersection of Marshall and Oxford. where he brandished his weapon and asked a bystander for his car keys so he could escape. Nelson Aff. ¶ 9. When the man declined, Scott saw Craighead at his car and approached him, demanding a ride. McDougle Dep. at 87-88. Craighead refused and Scott flashed the gun, repeating the demand, and the two men then physically engaged, wrestling for the pistol. Id. at 88-90. Joyce McDougle ("McDougle"), Craighead's fiancé and the mother of his children, got out of the car and observed Craighead seize the gun away from Scott in their continuing struggle. Id. at 90-91. She then ran into the house to tell Price to call the police. Id. at 94.

Price had seen the events unfold and called 911 at 10:23:15. Jeffery Aff. ¶ 12. Lee heard the ensuing dispatch broadcast while at a nearby intersection. He believed the gunman could be the suspect in the two earlier shootings, in possession of a large caliber gun, capable of penetrating his protective vest. Lee Dep. at 74-75; Lee Statement at 22. He loaded his police shotgun with one round and proceeded to 217 Oxford. As he crossed Marshall Avenue. Let: first saw McDougle, who yelled "he's got a gun." Lee Dep. at 76. He then drove on and observed Craighead and Scott pulling at one another in an alley. Id. Lee has testified he stepped from his squad car armed with the shotgun and with his radio headset switched off, so that he was unable to hear the continued broadcast transmission of the additional information being given to dispatch by the 911 operator. Lee Dep. at 91-92. 126. At this time, non-party witnesses relate that Craighead, who was six inches taller than Scott, was holding the gun pointing up towards the sky, attempting to keep it out of Scott's reach. Price Dep. at 43-44,49,51; McDougle Dep. at 92. Price relayed to the emergency

operator that the man holding the gun was not the suspect, that he had gotten it "away from the bad guy." Jeffery Aff. ¶12. This information was then broadcast on the police dispatch radio at 10:24:18, but because he was outside of his car without his headset turned on, Lee testified he did not hear this crucial information.[2] Lee Dep. at 126.

Scott continued to grab for the gun, which Lee observed in Craighead's right hand. About three seconds after leaving his vehicle and advancing toward the two struggling black men, Lee released the safety and fired one round, fatally wounding Craighead. Price Dep. at 52: Lee Dep. at 100; Goetz Aff. Ex. Q (Final Autopsy Protocol). Lee believes he feared for his life and that the armed man was the perpetrator of the morning's shooting spree. Lee Dep. at 106. The witnesses say they never observed the gun pointed at Lee. Price Dep. at 49; Adams Dep. at 38; McDougle Dep. at 106. They further testified they did not hear Lee give any warning or command to drop the weapon before he fired a shotgun blast at Craighead. Price Dep. at 52, 65-66; Adarns Dep. at 32; McDougle Dep. at 106.

Police officer Rob Stanway had also responded to the alert, and states that when he arrived on the scene he stopped three to four car lengths behind Lee's vehicle and saw two black males struggling over a gun. Stanway Dep. at 18,21,23-24. He was just beginning to exit his squad car when heard the shot from Lee's gun and observed Craighead fall to the ground. Id. at 20-2 1, 34-35. At 10:24:29 Lee made a call on his radio reporting "one down." Jeffery Aff. ¶ 12.

Scott subsequently admitted to a homicide investigator of the St. Paul Police Department that he was responsible for the two shootings on the morning of on December 3, 2001,

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[2] Plaintiffs assert Lee's deposition testimony that he almost always switched his headset on when exiting the squad car establishes evidence of habit contradicting his sworn statement in this case that he did not hear the broadcast' of the gun changing hands between the wrestling men.

prior to the encounter with Craighead. Nelson Aff. ¶¶ 6-9.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment will be rendered when there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine dispute of material fact is present and summary judgment is inappropriate when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party and makes all permissible inferences in her favor. Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995). However, the nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995).

B. Section 1983 Excessive Force Claim

Plaintiffs have conceded their 42 U.S.C. § 1983 claims against the City and, therefore, against Lee in his official capacity. See Pls.' Mem. in Support at 2 n.2; Johnson v. Outboard. Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999). Thus, the claim against Lee individually is the only remaining count premised on federal law.

Public officials such as Lee are entitled to qualified immunity from civil liability if their actions were objectively reasonable in light of established law. Anderson v. Creighton, 483 U.S. 635, 639 (1985). The threshold question of the qualified immunity inquiry is whether "the facts alleged show the officer's conduct violated a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001). If so, the court proceeds to assess whether or not the particular right asserted was clearly established. Id. "The contours of the right must be sufficiently

clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640.

1. Violation of a Constitutional Right

The Fourth Amendment standard of objective reasonableness governs claims of use of excessive force by law enforcement officers. Saucier, 533 U.S. at 201-02; Graham v. Connor, 490 U.S. 386.388 (1989). To establish violation of the constitutional right to be free of unreasonable seizure, Plaintiffs must show Lee's use of deadly force against Craighead was objectively unreasonable. Graham. 490 U.S. at 394-95. The determination of whether an officer's use of force was reasonable is an objective assessment based upon the circumstances of the particular case, including the three factors of "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. A police officer may constitutionally use deadly force where he has probable cause to believe the suspect poses a significant threat of death or serious harm to himself or others. Tennessee v. Garner, 471 U.S. 1, 11-12 (1985); Hernandez v. Jarman, 340 F.3d 617, 622 (8th Cir. 2003). The defendant's actions are judged from the perspective of a reasonable officer on the scene and without the benefit of hindsight. Id.

Plaintiffs assert a reasonable jury could find Lee's actions objectively unreasonable and therefore that qualified immunity is inapplicable.[3] They argue firing at *two* struggling persons when all reports consistently identified the suspect as a single armed black male, where witness testimony is that the

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[3] While qualified immunity is a question of law for the Court, the excessive force issue of objective reasonableness is often appropriate for jury consideration and may therefore preclude summary judgment based on qualified immunity. Wilson v. City of Des Moines, 293 F.3d 447, 453-454 (8th Cir. 2002); see also Curley v. Klem, 298 F.3d 271, 278 n.3 (3d Cir. 2002).

gun was not pointed in Lee's direction and where no warning was given,[4] constitutes an unjustifiable overreaction. To hold otherwise, they contend, would provide police a right to indiscriminately fire at any person in the vicinity of a weapon, regardless of the threat posed. Defendants maintain that despite the tragic mistake, Lee acted reasonably under the tense and rapidly-evolving situation in which he found himself. They emphasize the severity and intensity of the morning's events and that hindsight judgment is not appropriate. Both sides proffer expert testimony in support of their respective positions.

In considering the reasonableness of Officer Lee's conduct on the morning of December 3, 2001, the seriousness of the crimes committed by the perpetrator of the shootings weighs in favor of Defendants' position. See Graham, 490 U.S. at 396. Lee has testified that he believed the person he was pursuing was likely responsible for the two earlier shootings and was a dangerous individual. See Lee Dep. at 74. The reported crimes of that morning were extremely violent and reflected Scott's willingness to use his gun. However, "the intrusiveness of a seizure by means of deadly force is unmatched." Garner, 471 U.S. at 9. To employ such force an officer must have probable cause to believe the suspect presents an immediate threat of serious physical harm. Id.at 11; Hernandez, 340 F.3d at 622. At this procedural juncture in the case. the facts as construed in Plaintiffs' favor do "not conclusively establish the reasonableness of [Lee's] actions or beliefs." Wilson v. City of Des Moines, 293 F.3d 447, 454 (8th Cir. 2002). While appreciating that "police officers are often forced to make split second judgments" in volatile, uncertain circumstances, and that the record may well develop differently at trial, presently genuine issues of fact exist as to whether a

[4] As noted below, Lee testified he gave repeated oral commands to drop the weapon. Lee Dep. at 96.

reasonable officer in Lee's position would "haw believed his actions to be lawful." Graham, 490 U.S. at 397; Wilson, 293 F.3d at 449. Under Plaintiffs' version of the facts; which Defendants acknowledge the Court must accept for purposes of this Motion, Lee drives to the scene and sees two men tussling with one another, with the gun held by the taller man waving in the air, generally pointed upwards. Knowing that only one black male is suspected in the earlier crimes and that one of the two men before him is most likely a victim, he gets out of his squad car and without any warning or command aims and fires his shotgun within a period of about three seconds.[5] Given this set of facts, a scenario is presented in which Lee's decision to fire a shotgun at two persons cannot be said to be reasonable as a matter of law.

Defendants analogize these facts to two Fourth Circuit cases in which the court found the officers entitled to qualified immunity for the mistaken shootings of innocent persons where no prior warnings were given. Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001); McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994). In Milstead law enforcement officials were responding to a 911 call reporting an attack on a man and woman in their home by the woman's former boyfriend. 243 F.3d at 160. When the police officer in question shot the individual who turned out to be the male victim, much had transpired since the officer's arrival at the scene and ht: had seen and heard first-hand the suspect's propensity for violence. Id. The intruder had pointed a gun at him and his partner and the officer had reason to believe he

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[5] Lee's deposition testimony outlines very different facts. He states a greater period of time elapsed before he fired his weapon, that he gave loud, repeated warnings to drop the g~ul, and that Craighead acknowledged him and set the gun down, but then picked it back up and pointed the gun at Lee in such a way as he feared for his life. Lee Dep. at 96.99-100. At triiil the parties will have an opportunity to further develop and probe this description of the events and other areaq of discrepancy in the discovery evidence.

had witnessed the suspect shoot his partner down in front of him. Id.at 160. Additionally, he had heard the suspect yell he was going to "'kill you all,'" and believed the man running towards him could only be the intruder because he knew the male victim had been shot in the neck and therefore thought he could not have been running. Id.at 165. The court found under these particular circumstances that when the man came crashing through the door and turned in the direction of the officer he appeared to pose an imminent deadly threat justifying the split-second use of deadly force. Id.at 163, 165.

McLenagan similarly involved a shooting directed at a single, though mistaken, suspect in circumstances that appeared to present an immediate threat of serious bodily harm. In that case, a deputy was repeatedly yelling, "'The man has got a gun!'" as she came running down the hallway of a make-shift courthouse to get away from an arrestee she believed had got hold of a weapon. 27 F.3d at 1005. Continuing her shouts, the deputy ran past a nearby police officer, who turned and saw a man running closely behind the deputy and almost upon the officer. Id. He could not see whether this man had a gun in his hands, but believing him to be the armed suspect, he shot him. Id. The man, who turned out to be another arrestee also trying to flee (he building for fear of the perceived danger, sustained serious injuries. Id. The court held the credible warning of imminent danger given by the deputy and the lack of available reaction time due to the perceived suspect's close and advancing proximity to the officer rendered the shooting officer's actions objectively reasonable. Id. at 1007-08.

Neither of these cases involved a situation in which an officer, with knowledge of one violent suspect, but not in a hot pursuit situation, was confronted with two individuals, a perpetrator and a victim, who fired almost immediate; at the man with the gun despite indications that a warning was feasible and that the circumstances may not have posed an immediate threat to the officer. Thus, these factual scenarios

are readily distinguishable from the troubling fact pattern in the case at bar.

Moreover, in considering the third Graham factor for assessing reasonableness, Craighead was not attempting to flee or escape capture at the time of the incident. Instead he was actively grappling with Scott, and Lee concedes this was apparent, that they gave no indication of acting in concert. Lee Dep. at 91. Plaintiffs' submissions present sufficient evidence to permit a reasonable jury to conclude that Lee's actions were not objectively reasonable under the circumstances. See generally Goetz Aff. Ex. N ¶7 (Blaricom Preliminary Expert Report), Ex. O at 5-10 (Reiter Preliminary Expert Report).

This rendition of the facts is strictly based on Plaintiffs' evidence and is contested by Lee's contrary testimony and Defendants' expert opinions. Law enforcement is a job fraught with danger and the necessity of quick action. Courts should not sit to "second guess the split- second judgments of a police officer to use deadly force in a context of rapidly evolving circumstances, when inaction could threaten the safety of the officer or others." Milstead, 243 F.3d at 165. However, where the record contains disputed facts raising a question as to whether or not the officer could reasonably have perceived an immediate threat, summary judgment is inappropriate. Wilson, 293 F.3d at 454; cf. Hernandez, 340 F.3d at 624 (*undisputed* evidence established appearance of significant, serious threat of harm). Further, it is significant that Defendants' assertion that Lee was protecting the unarmed man is contradicted by Lee firing a shot gun at two intertwined persons where either could have easily been hit, and in fact both were.

Accordingly, "the general prohibition against deciding qualified immunity questions in the face of disputed historical facts" applies to this case. Curley v. Klem, 298 F.3d 271, 273 (3d Cir. 2002) (citing Wilson, 293 F.3d at 454, and cases of other circuits). Defendants' Motion for Summary Judgment on

the federal claims is denied.

C. State Law Claims

Plaintiffs additionally allege direct and vicarious negligence by Lee and the City, respectively. Compl. ¶ 27. They voluntarily dismiss their claims of negligent retention and supervision against the City. Pls.' Mem. in Support at 30 n.162; Compl. ¶ 28. Defendants argue for summary judgment on the sole remaining wrongful death claim on the basis of official immunity.

The doctrine of official immunity shields public officials from liability for the performance of discretionary functions unless the official commits a willful or malicious wrong. Johnson v. Morris, 493 N.W.2d 3 1'41-42 (Minn. 1990). Additionally, it protects the government entity employer from vicarious liability for actions that are entitled to immunity Wiederholt v. City of Minneapolis, 581 N.W.2d, 312, 318 (Minn. 1998). As a general rule, this defense applies to the duties of law enforcement officers. Johnson, 493 N.W.2d at 42.

Malice is the intentional violation of a known right, such that an officer acts with malice when the officer willfully commits an act he or she has reason to believe is unlawful. State by Beaulieu v. Citv of Mounds View, 51 8 N.W.2d 567, 571-72 (Minn. 1994). This inquiry is usually a question of fact for the jury. Johnson, 493 N.W.2d at 42. For the reasons expressed above regarding qualified immunity from the federal claims, Defendants' Motion for Summary Judgment on the state claims is also denied.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment [Docket No. 37] is **DENIED** as to the claims against Defendant Michael A. Lee, individually, and the wrongul death claim of vicarious liability against Defendant the City of St. Paul, and is

GRANTED as to the 42 U.S.C. § 1983 and negligent retention and supervision claims against Defendant the City of St. Paul.

BY THE COURT: s/_____

Date: January 27, 2004 Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1377

Shenita Craighead, et al., *
Appellees, *
*
* Order Denying Petition for
vs. * Rehearing and for Rehearing
* En Banc
Michael A. Lee, et al., *
Appellants.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 18, 2005

Order Entered at the Direction of the Court

s/_____
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Shenita Craighead and Sherell Craighead, as Co-Trustees for the Heirs and Next-of -Kin of Charles Craigheand, Deceased,	* Appeal from the * United States
Appellees,	* District Court for the * District of Minnesota
vs .	*
Michael A. Lee and the City of St. Paul,	*
Appellants.	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199) January 10, 2005

Order Entered in Accordance with Opinion:

s/_____

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth

Supreme Court, U.S.
FILED
JUL 11 2005
OFFICE OF THE CLERK

(2)

No. 04-1695

In the Supreme Court of the United States

Michael A. Lee,

Petitioner,

v.

Shenita Craighead and Sherell Craighead as Co-Trustees for the Heirs and Next-of-Kin of Charles Craighead, Deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a police officer entitled to summary judgment on qualified immunity grounds as a matter of law when the facts alleged by Respondents establish that he shot and killed a man who posed no immediate threat to anyone and failed to give a warning before using deadly force though it was feasible to do so?

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STATEMENT OF THE CASE

I. Incident Giving Rise to the Case.

1. The information dispatched to Michael Lee before he arrived at 217 North Oxford did not provide any reasonable basis to believe that Charles Craighead was the suspect in the earlier shootings that day.

The initial descriptions of the suspect involved in the two earlier shootings on December 3, 2001, were extremely vague and limited. A summary of the information dispatched is as follows:

Incident 1: Shooting at Minnehaha and Victoria

	Time	Information
▪	9:13:01	single shooter in black Blazer, no other description
▪	9:13:28	suspect described as black male
▪	9:14:59	suspect vehicle changed to newer green Ford Explorer

Incident 2: Shooting at Chatsworth and Iglehart

	Time	Information
▪	10:20:10	[Dispatcher] "All I had is a Black male running towards Marshall. I don't know if that is the victim or the shooter."
▪	10:20:46	[Dispatcher] "All I have so far is a Black male and I haven't had anything else....Black male running, that's towards Marshall. That's all I have."

Incident 3: 217 North Oxford

Time	Information
▪ 10:23:43	[Dispatcher] "Squads, we got a Black male with a gun at 217 North Oxford across from Central High School. We have somebody on the phone reporting this. Unknown if it's one or two parties with guns."

The suspect in the earlier incidents was a single black male. Officer Lee had no reports that the suspect had an accomplice. St. Paul Police Officer Rob Stanway also testified that the extent of the suspect description that he had as he headed toward 217 North Oxford was a single black male.

2. Information was dispatched to Michael Lee before he shot Mr. Craighead that the person with the gun, Mr. Craighead, was not the suspect.

On the morning of December 3, 2001, all communications from St. Paul Police Department dispatch to the on-duty officers went out over one radio channel. At 10:24:18 the following information was broadcast to all officers about the ongoing events at 217 North Oxford:

> **One of the man (sic) the males took a gun away from another male....**

At 10:24:30, some 12 seconds after the above transmission began, squad 559, Lee, reports "one down" at 217 North Oxford.

3. Lee shot Mr. Craighead though he would have then known that the person with the gun, Mr. Craighead, was not the suspect.

Lee took just 3 seconds to shoot Mr. Craighead once he stepped from his squad. Meredith Price, an eyewitness to

these tragic events, testified that Lee "arrived, got out of the car, and shot [Craighead]. It was pretty much that quick." Ms. Price testified that Lee had been out of his car for only a few seconds, three, maybe, before he fired.

Another eyewitness, John Doe, was looking out a window in a house just a few doors down from the shooting. He also testified that Lee fired his shotgun "very quickly," "very, very fast" after he got out of his car. Doe described how Lee got out of his squad and fired seemingly in a fluid motion:

> The officer got out. It looked like he had a shotgun. And I heard another shot. And then I seen, you know – I just seen another shot go off. Not seen. I heard it and I seen the shot go off.

St. Paul Police Officer Rob Stanway was three to four car lengths behind Lee's squad as they were both driving toward 217 North Oxford. Stanway remained at this distance as he and Lee stopped their respective squads on Oxford. Stanway agreed that Lee could only have been stopped for a matter of a very few seconds when the shooting occurred.

Lee always had his police car radio on. When Lee was not in his squad, he maintained contact with police dispatch through his portable communications unit known as a "pack set." Lee testified that he would turn his pack set on by reflex as he exited his squad. His pack set was certainly on when he reported "one down" at 10:24:30. Lee's reflexive turning on his pack set as he gets out of his squad is consistent with the common practice among St. Paul police officers to turn their pack sets on as they get out of their squads.

The above evidence flatly contradicts Lee's claim that before he fired he did not hear the broadcast effectively informing all St. Paul police officers that the "good guy," Craighead, was now the one with the gun.

Reasonable inferences from the above facts are:

- Lee was still in his squad at 10:24:18 with the radio on when dispatch relayed the information about one man taking the gun from the other.
- If Lee did exit his squad before the broadcast, which appears very unlikely given the timing of the events, he had his pack set on and would still have heard the information before he fired.

4. The circumstances existing at the scene when Lee arrived did not give him or any reasonable police officer probable cause to believe that Charles Craighead was the suspect involved in the earlier shootings or any other crime involving the infliction or threatened infliction of serious physical harm.

As discussed above, the information about the suspect in the earlier shootings was very limited and vague. It is undisputed, however, that only a *single* black male was a suspect.

When Lee pulled up in front of 217 North Oxford he saw *two* black males involved in a physical tussle in which they appeared to be pulling back and forth at each other. Officer Stanway also saw the two men struggling with each other when he pulled up. Stanway was approximately 50 feet away from the men and on the same side of Oxford Avenue as Lee when he arrived. It was obvious to Stanway that the men were not cooperating with each other.

Based on all the circumstances present when he arrived, Stanway could not and did not make any assumptions about which of the two men was in fact the suspect the police were looking for in connection with the two shootings that occurred earlier that day. While Stanway assumed one of the two men was the suspect, he did not know which one.

Officer Stanway acknowledged that at no point could he tell which of the two men was the "good guy" and which one was the "bad guy." Lee also admitted that when he got out of his squad he did not know who was the "good guy" and who was the "bad guy."[1]

5. Officer Lee shot Mr. Craighead even though there was no reasonable basis to believe that Craighead posed a threat of death or great bodily harm to Lee or anyone else.

Meredith Price, the proprietor of MAP industries, is in the business of fixing up older homes. She hired Charles Craighead to paint the interior of the house at 217 North Oxford Street in St. Paul. This address is across the street from the scene where Charles Craighead was killed.

On the morning of December 3, 2001, sometime after 10:00 a.m., Charles and Meredith were meeting in the house at 217 North Oxford. Joyce McDougle, Mr. Craighead's life-partner, was waiting in their car in front of the house.

Charles left the meeting to get some paperwork from his car so he could prepare an estimate of the cost for the painting. Ms. Price followed him outside.

Price testified that she then saw an individual who she did not know walk up to Charles Craighead. She heard Charles say something to the effect of "don't pull that piece on me." Craighead then grabbed the other man, later determined to be Carlos Scott, in a bear hug. Craighead continued to hold Scott in a bear hug as the two men struggled and shuffled across the street towards a dumpster.

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[1] Lee's testimony on this point is fraught with contradictions. He goes on to testify that he believed Craighead was the "bad guy," then acknowledges that he didn't know which of the two men was the suspect, then states that Craighead must have been the suspect, a conclusion he bases solely on the fact that Craighead was the one holding the gun.

Price watched as Craighead managed to get Scott's gun away from him during the struggle. Craighead then held the gun up over his head away from Scott. Craighead was a good six inches taller than Scott. He was therefore able to continue holding the gun up over his head away from Scott after Lee arrived.

Price never lost sight of the gun before Lee shot. She testified that Craighead *never* pointed the gun at or in the direction of Officer Lee before he fired. Craighead always held the gun high up over his head pointed towards the sky. As Price described the scene, when one looked at Craighead and Scott struggling by the dumpster, their actions were as if an older taller sibling was holding a toy high above his head thereby preventing the younger shorter sibling from grabbing it.

Price's testimony was unequivocal: Craighead did nothing to threaten Lee or anyone else. Price never felt threatened though she was just across the street from Craighead and Scott, almost directly behind Officer Lee.

John Doe's testimony also establishes that Craighead never posed a threat to Lee or anyone else. Doe was standing 10 to 15 feet away on Oxford when he saw Carlos Scott tussling with an older gentleman by a red car. The older man, Craighead, was taller than Scott.

Doe saw the two men struggling over Scott's gun. The tussle began by the red car and then continued across the street by a dumpster. Doe heard the gun go off at which point he went in the house at 1044 Marshall.

Once inside the house Doe watched the events unfold from a window that looked out upon the scene. Doe saw Lee pull up. From his vantage point Doe had a clear view of the dumpster area and the officer with the shotgun.

It was evident to Doe that Craighead was trying to stop whatever was going on. Doe never saw Craighead point a gun in Lee's direction.

Joyce McDougle gives a similar account to that of Price and Doe. She saw Craighead wrestle the gun away from Scott. Craighead continued to hold the gun in his hand as Scott tried to take it back from him. Craighead was taller than Scott. Craighead held the gun up in the air – pointed up in the air. Scott was jumping up trying to get the gun. He could not get it because Craighead was taller.

The gun was always pointed up in the air. Craighead never pointed the gun at Lee.

Officer Stanway also testified that he did not see Craighead point the gun at Lee. Stanway testified that Craighead did not point the gun at him or at Scott. Stanway could not tell what the man holding the gun was attempting to do. Considering the totality of the then existing circumstances, Stanway testified that he did not have any reason to discharge his firearm.

Lee did not claim that he shot Craighead solely because he believed he was the suspect from the earlier shootings. Contradicting the arguments of his counsel, Lee claims that certain supposed actions by Craighead gave him reason to fear for his life and therefore fire his shotgun. According to Lee's testimony, the basis for his claimed justification for the use of deadly force is that after Lee told Craighead to put down the gun, Craighead set the gun in the dumpster then, after two seconds or so, Craighead picked the gun back up, pointed it directly at Lee, pointed it directly at Scott, then pointed it directly at Lee again, at which point Lee fired. Lee testified that he did not fear for his life **until after** these supposed actions occurred.

Whether Craighead did or did not put down the gun, did or did not pick it up again, and did or did not then point it at Lee are all material facts in controversy in this case. Price testified that Craighead never put the gun down and picked it up again. Officer Stanway testified that he did not see Craighead put the gun down before Lee fired. Stanway also did not see Craighead pick the gun up again. According to Stanway, the gun was always in the hand of the man who held it until Lee fired.

6. Lee failed to give any warning before he resorted to deadly force though it was feasible to do so.

Whether Lee did or did not give any warning before he used deadly force is another controverted fact in this case. Lee claims he did. He testified he yelled to Craighead: "...police, drop the gun, drop the gun, drop the gun, loud. I screamed it. I was clear."

Price testified that Lee did not say anything before he fired. She testified that she did not see or hear Lee yell anything before he killed Craighead.

McDougle also testified that Lee never said anything before he killed her life partner. Lee just pulled up real fast, jumped out of his car, and "just shot." Doe also testified that he never heard the officer say or yell anything before he fired. Officer Stanway also testified that he did not hear Lee shout any instructions before he opened fire.

7. Respondents' Experts.

Respondents had the circumstances of this case reviewed by two experienced and highly qualified police practices experts, both of whom agree that no reasonable police officer would have believed it was lawful to shoot Craighead as Lee did.